Supreme Court, U. S.
FILED
MAR 3 1976
MICHAEL RODAK, JR., CLERK

No. 75-859

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OCTOBER TERM, 1975

RONALD J. ROWBOTHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court committed reversible error in denying his motions for a severance and an acquittal.

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted of one count of conspiracy to embezzle and convert to his own use government ammunition of a value in excess of $100, in violation of 18 U.S.C. 371; to receive this ammunition, knowing it to be stolen, in violation of 18 U.S.C. 641; and to transport it in interstate commerce, having reasonable cause to believe it was stolen, in violation of 18 U.S.C. 922(i).[1] He was sentenced to one

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[1]The indictment also charged six other defendants with the same offenses (Pet. App. 29-32). Five of the co-defendants pleaded guilty. The jury deadlocked as to a verdict on co-defendant Woodcock who, with petitioner, had pleaded not guilty. Subsequent to the court's declaration of a mistrial as to Woodcock, the government dismissed the indictment against him.

year's imprisonment and was fined $2,000. The court of appeals affirmed *per curiam* (Pet. App. 25-26).[2]

The evidence showed that co-defendant Lavinghouse was a United States Navy Petty Officer at the Naval Construction Battalion Center in Gulfport, Mississippi, in charge of ammunition bunkers. He was authorized by the Navy to dispense ammunition, which was suspended from military use and designated to be destroyed, to law enforcement officers of the Gulfport Police Department and the Harrison County Sheriff's Department for official use (Tr. 121-122, 126-128, 153-157).

In mid or late 1972, co-defendant McDonald, a Gulfport police officer, approached Lavinghouse at the naval base and discussed with him the possibilities of obtaining this ammunition. McDonald informed Lavinghouse that the ammunition was to be used for training purposes by the Gulfport police. Acting under this belief, Lavinghouse provided McDonald with 100,000 to 250,000 rounds of government ammunition, over a period of approximately one year (Tr. 123-130, 133-136, 156-157, 159, 162, 174-175, 184-186, 210).

During this period McDonald made arrangements with petitioner, a licensed and experienced gun dealer in New Orleans, Louisiana, to trade the ammunition in exchange for weapons supplied by petitioner (Tr. 133, 187, 206-208, 268-270, 448-449, 585-586, 638). McDonald told petitioner that the ammunition was from the naval base, and they discussed the illegality of selling government ammunition (Tr. 203, 209, 211-212). Petitioner also informed McDonald that the ammunition was being taken to New

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[2] The court of appeals, however, remanded for resentencing because the district court considered petitioner's plea of not guilty to be a factor "militating in favor of a more severe sentence" (Pet. App. 26). Petitioner was resentenced to one year's imprisonment and a $500 fine (Pet. 7).

Orleans, Louisiana, for sale to the New Orleans Police Department. On at least one occasion McDonald hauled approximately 75,000 rounds of the ammunition to a gun dealer in Louisiana (Tr. 206, 217, 235-236, 273, 544, 593).

During the period of the conspiracy, petitioner traded at least seven weapons with McDonald in exchange for approximately 60,000 rounds of the naval ammunition (Tr. 191-204, 208, 215-216, 219, 228-230, 323-328). On one occasion, petitioner received ammunition from McDonald, in return for a pistol which was delivered by McDonald to co-defendant Woodcock (Tr. 321-322).

In March 1973, when there was a possibility of an investigation by the Navy regarding ammunition missing from the naval base, petitioner instructed McDonald not to incriminate anyone in regard to the missing ammunition and made a veiled threat against McDonald's life (Tr. 212-215). McDonald ceased trading the ammunition to petitioner in May 1973 (Tr. 216-217).

In addition to trading with McDonald, petitioner also exchanged weapons for the naval ammunition with co-defendant Blocker. Blocker, who was in the Navy and was also a member of the Harrison County Sheriff's Department, obtained 50,000 rounds of ammunition from the naval base by misrepresenting that the ammunition was to be used by the Sheriff's Department (Tr. 131-132, 137-138, 274-275, 282, 542, 556). On one occasion in March, 1973, petitioner delivered five semi-automatic rifles to Blocker and other people at an apartment rented by petitioner in Gulfport, Mississippi in return for naval ammunition (Tr. 277-278, 283-284, 294, 301-303, 307, 570-573).

Petitioner did not present evidence on his own behalf, or testify, but relied on cross-examination of witnesses and on co-defendant Woodcock's testimony in an attempt

to show that he was not involved in a conspiracy. Woodcock's defense was that he was working undercover to catch McDonald, his fellow police officer, illegally appropriating ammunition from the naval base. Woodcock did not claim that petitioner was involved in McDonald's activities (see discussion *infra*, p. 6).

1. Petitioner contends that the district court erred in denying his motion for a judgment of acquittal.

a. To grant such a motion, the court "must find that when viewed in the light most favorable to the government, the evidence is such that a reasonable juror *must* have a reasonable doubt as to the existence of any of the essential elements of the crime." *United States* v. *Peterson*, 509 F.2d 408, 411 (C.A. D.C.) (emphasis in original; foot omitted); Accord, *e.g.*, *United States* v. *James*, 510 F.2d 546, 551-552 (C.A. 5); *United States* v. *Figueroa-Paz*, 468 F.2d 1055, 1058 (C.A. 9). Although the court couched its standard for review of petitioner's motion in terms of a "prima facie case" (Tr. 463),[3] the court's assessment of petitioner's motion (Tr. 459-462; see also 467-469) shows that the court properly denied it. In any event, viewed in the light most favorable to the government (*Hamling* v. *United States*, 418 U.S. 87, 124; *Glasser* v. *United States*, 315 U.S. 60, 80), the evidence was clearly sufficient to support petitioner's convictions.

The government proved that petitioner met with co-defendants McDonald and Blocker and others for the express purpose of trading weapons for the naval ammunition. Petitioner contends that he believed the

[3] In response to petitioner's motion for judgment of acquittal, the court stated (Tr. 463):

> We are not here concerning the question of reasonable doubt, Mr. Morris, if we were, there would be no question but that its a question for the jury. I assume you mean that there is not enough evidence to make a prima facie case?

ammunition was legally dispensed, and thus he did not have the necessary intent to enter into a conspiracy. This claim is refuted by the record, which shows that petitioner was an experienced dealer in firearms and ammunition who knew the source of the ammunition. Moreover, McDonald discussed with petitioner the illegality of selling government ammunition, and petitioner instructed him not to incriminate anyone when there was a possible investigation of the missing ammunition. This, combined with the circumstances attending the trading of the ammunition and weapons, warranted the jury's rejection of the implausible defense offered by petitioner.

b. Petitioner's claim that the government failed to prove that the ammunition had a value exceeding $100 is also without merit (Pet. 15-16, 19-21). Proof of a violation of 18 U.S.C. 641 is not dependent on the value of the property. Value is significant only with respect to the sentence, which is limited to one year's imprisonment and a fine of not more than $1,000 if the value is under $100 (see, *e.g.*, *United States* v. *Devall*, 462 F.2d 137, 142 (C.A. 5); *United States* v. *Lacario*, 431 F.2d 1182, 1184 (C.A. 9); *Montgomery* v. *United States*, 403 F.2d 605, 610 (C.A. 8), certiorari denied, 396 U.S. 859. Petitioner's sentence upon remand was within these limits. In any event, the government proved that the value of the ammunition was over $100 when it established the "market value" and "cost price" of the ammunition (Tr. 139, 176-177, 187, 207-208, 217-218, 268, 270).

2. The district court did not commit reversible error in denying petitioner's pretrial motion for severance. The decision whether to sever is within the sound discretion of the district court. *Schaffer* v. *United States*, 362 U.S. 511; *Opper* v. *United States*, 348 U.S. 84, 95; Rules 8(b), 14, Fed. R. Crim. P. It is not an abuse of such discretion to deny severance prior to trial where, as here, "there was no

mutual exclusivity among the defense, i.e., nothing to indicate that 'if one defense were believed, the other[s] could not be' ". *United States* v. *Addonizio*, 451 F.2d 49, 63 (C.A. 3), certiorari denied, 405 U.S. 936.

Woodcock made no attempt to implicate petitioner or shift culpability to him. Rather, Woodcock consistently maintained that he developed no evidence implicating petitioner (Tr. 538, 574-575, 579, 588-590, 597-598, 605, 640, 653, 658). Furthermore, there was no confrontation problem, since Woodcock testified, and was subject to cross-examination.[4]

Under these circumstances, the motion for severance was properly denied, and the court's admonitory instructions sufficiently segregated the co-defendants so that an intelligent verdict could be rendered as to each (Tr. 925, 927-928).[5]

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[4]Petitioner also failed to renew his motion for severance at any time during trial, which ordinarily constitutes a waiver of the motion for severance. See, *United States* v. *West*, 517 F.2d 483, 484 (C.A. 8); *United States* v. *Figueroa-Paz*, *supra*, 468 F. 2d at 1057.

[5]Petitioner's reliance on *United States* v. *Johnson*, 478 F.2d 1129 (C.A. 5) (Pet. 9-10), is misplaced. In *Johnson*, a defendant's defense was that he did not participate in the passing of counterfeit federal reserve notes. However, this contention was completely antagonistic to the defense of a co-defendant, who claimed to have committed the crime in his capacity as an undercover police officer, and made a confession directly incriminating the defendant. Furthermore, the co-defendant's counsel in closing argument had "no qualms about casting [the defendant] as the major culprit in the counterfeit transaction" (478 F. 2d at 1133), and the evidence of defendant's involvement, independent of co-defendant's confession, was insufficient to support defendant's conviction.

Petitioner's claim of prejudice because of the possible spillover effect of evidence introduced against Woodcock (Pet. 10) does not show a probability of actual prejudice justifying reversal. See, *Woodcock* v. *Amaral*, 511 F. 2d 985, 993-995 (C.A. 1), certiorari denied, October 6, 1975, No. 74-1652; *United States* v. *Jenkins*, 496 F. 2d 57, 70-71 (C.A. 2), certiorari denied, 420 U.S. 925.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.